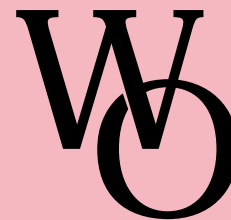

Wilson & Orcutt, P.C.

Business Law Newsletter



Wilson & Orcutt, P.C.
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The Software Police Are Coming

It has been estimated that as much as one half of the computer software in use by small businesses in this country has been illegally copied. When you load software onto your hard drive, you are “copying” it for the purposes of federal copyright law, and your right to do so is contained in a license agreement which comes with the program when purchased. Usually, that license allows you to install the program on one machine and make one backup copy for use on the same machine. In order to have the right to use the program on more than one machine a so called “site license” must be obtained at additional cost.

The prevalence of informal software “sharing” has driven the software industry to take steps to protect themselves. They have formed a real world version of the mythical software police, called the Business Software Alliance (“BSA”).

The BSA is a software trade association made up of the largest software publishers, including Lotus and Microsoft. Among its activities, the BSA pursues anti-piracy efforts and enforces its members’ rights under copyright law. The BSA has already collected millions of dollars in settlements.

Civil damages under the copyright law provide for either actual damages (the retail price for the unlawful software being used), or statutory damages ranging from \$500 to \$20,000. In addition, there might be liability for attorney’s fees and costs associated with enforcement.

Do not assume that your company is too small to be of concern to the BSA. They operate over 35 hotlines throughout the country, and they receive tens of thousands of calls, most often from disgruntled former or current employees.

What should you do? First, conduct an audit of the software in use. Replace all pirated software with legitimate copies. Formulate a company wide policy requiring licenses for all software in use.

Lastly, keep thorough records of all software purchases and licenses.

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Borrowing Strategies

There's an old saying that the best time to borrow from a bank is when you don't need the money. There is truth to that, and it makes a lot of sense to set up a line of credit during good times, so that it is readily available when the cash flow falls off.

However, we don't always plan so well in advance, and might need to apply for a bank loan in actual times of need. When that happens, it's helpful to know what a banker is looking for in reviewing a loan application.

The first rule a loan officer learns is not to rely upon collateral as the primary source of repayment. That means that your loan officer will want to see sufficient cash flow to cover both interest and principal payments. If the purpose of the loan is to get you through tough economic times when the cash flow just isn't there, have a clear, reasonable and understandable explanation for why your cash flow problem is only temporary and have a detailed plan to turn it around.

Unless your company is so strong it doesn't need the loan, no doubt the bank will want collateral, in the form of receivables, inventory, equipment, work in progress, etc. The collateral will be considered the bank's secondary source of repayment. Sometimes, in order to balance against credit risk, the bank will want a third source of repayment, in the form of personal guarantees, and collateral on personal guarantees.

In addition to interest rate and term of the loan, different banks may well have different requirements for sources of repayment. Therefore, it almost always makes sense to apply to at least two lenders. This may give you negotiation leverage with both

lenders, as well as a fall back position if one lender declines the loan.

Once you get a commitment for a loan, the potential for negotiating its terms does not end. Particularly with small business loans under \$100,000, the borrower is often not represented by an attorney and the loan officer closes the loan on "standard forms". Beware the use of standard language. It almost always is negotiable, and sometimes changes can make a difference. The common areas to be concerned with include:

Guarantees & Cross Collateralization

These items might not have been discussed before, and may be negotiable.

Default Clauses & Grace Periods

The typical bank form provides that a default occurs the first day a payment is late. Often, a grace period of up to ten days can be agreed to. Non payment defaults should have cure periods after written notice from the bank.

Affirmative & Negative Covenants

Standard form documents almost always include affirmative requirements, e.g. financial statements and insurance. They often also include prohibitions against subordinate financing, liens or attachments and financial performance requirements. Careful negotiation of these terms can often make the difference between a loan in default and one in good standing.

The bottom line is this: When applying for a bank loan, know in advance what the lender will be looking for, and think through those issues that are important to you.

A Privacy Survival Guide

Every day, more and more personal information is being added to the exploding number of databases being amassed by people and businesses trying to sell something. Most of us simply give that information away. However, we can be our own best protector of our privacy if we understand what is out there.

Credit Bureaus

The information in your credit report can determine whether you get a loan, a job, an apartment or insurance policy. It is available to anyone with a legitimate business need, and anyone else who knows how to get it.

To protect yourself from incorrect information, you should order your credit report once a year and correct any errors. To obtain copies of your report call one (or all) of the three major credit reporting agencies.

- Xperian (800)682-7654 (formerly TRW)
- Equifax (800)685-1111
- Trans Union (800)916-8800

Your credit report will tell you, not only who claims to be owed money by you, but also the names and addresses of everyone who has requested a copy of your report. You might find that information interesting.

Auto Insurance

The Comprehensive Loss Underwriting Exchange (CLUE) is a clearinghouse of information for the automobile insurance industry. It contains records of every claim you've made within the past five years with your own insurer. This information is used by auto insurers underwriting new

policies. If you have ever been denied coverage, it may be because of an error in your records. It is not that unusual for a claim by someone with a similar name to appear in your record.

You are entitled to a free copy of your report if you have been denied coverage; otherwise one is available for a modest fee:

- CLUE
P.O. Box 105108
Atlanta, GA 30348-5108
(800)456-6004

Medical Reports

If you have ever applied for insurance (who hasn't?) then your detailed medical history, and a great deal of other personal information, is stored in an insurance industry database, the Medical Information Bureau. You are entitled to a free copy of your report by writing or calling:

- Medical Information Bureau
P.O. Box 105
Essex Station
Boston, MA 02112
(617)426-3660

Mailing Lists

Your name, address, buying habits and other demographic information is regularly bought and sold by businesses who maintain specialized mailing lists. Every time you fill out product registration and warranty cards, list yourself in a phonebook, join or donate money to an organization, subscribe to magazines or fill out a questionnaire, you are adding information to those lists.

continued on page 4

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continued from page 3

To reduce the flow of junk mail, send your name and address to:

- Mail Preference Service
P.O. Box 9008
Farmingdale, NY 11735

You will be added to a list of people who do not want to receive unsolicited mail from the largest catalog and marketing companies. This won't stop all junk mail, but it will help.

Telemarketing

To reduce calls from telemarketers send your name, address and telephone number to:

- Telephone Preference Service
P.O. Box 9014
Farmingdale, NY 11735

Also, tell all telemarketers that you want to be put on their "don't call list". Federal law requires them to comply with that request.

For more information on privacy issues, contact the Privacy Right Clearinghouse at:

- The Center for Public Interest Law
5998 Alcada Park
San Diego, CA 92110
(619)298-3396
e-mail prc@teetot.acusd.edu

Suggested Sites for Cyberspace

Check out the CCH Business Owner's Toolkit at <http://www.toolkit.cch.com/>. It contains advice on a broad range of business issues, including startups, selling a business and taxes.

The Righttime Company provides information about the Year 2000 Doomsday scenario for computer systems utilizing calculations based on dates, and makes utilities that can help. Visit them at <http://www.righttime.com>.

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